Supreme Court, U.S.
FILED
SEP 9 1992
OFFICE OF THE CLERK

No. 92 - 265

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

DANIEL VASQUEZ, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES) AND FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (RUDI M. BREWSTER, DISTRICT COURT JUDGE)

PETER H. BENZIAN
Latham & Watkins
701 B Street, Suite 2100
San Diego, California 92101-8197
Telephone: (619) 236-1234

Attorney for Respondent

RICHARD CAMINO
17541 East 17th Street, Second Floor
Tustin, California 92680
Telephone: (714) 832-6620

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	3
II.	SUMMARY OF ARGUMENT	14
III.	ARGUMENT	15
	A. THERE IS NO NEED FOR RELIEF BY WAY OF EXTRAORDINARY WRIT	15
	B. NINTH CIRCUIT REMAND TO ALLOW DISTRICT COURT TO CONSIDER RULE 60(b) MOTION AFTER IT STATED ITS WILLINGNESS TO DO SO WAS APPROPRIATE	17
	C. RULE 60(B) IS APPROPRIATE IN HABEAS PROCEEDINGS	20
IV.	CONCLUSION	24

TABLE OF AUTHORITIES

CASES **Page(s)**

Allied Chemical Corp. v. Daiflon, Inc.,
449 U.S. 33 (1980) 15

Bankers Life & Cas. Co. v. Holland,
346 U.S. 379 (1953) 16

In re Blodgett,
502 U.S. __, 116 L.Ed.2d 669,
112 S.Ct. 674 (1992) 22

Carriger v. Lewis,
__ F.2d __, 92 DAR 10417
(9th Cir. 7/28/92) 18

Carriger v. Lewis,
__ F.2d __, 92 DAR 10417
(9th Cir. 7/28/92) 21

Gray v. Estelle,
574 F.2d 209 (5th Cir. 1978) 21

Hamilton v. Vasquez,
882 F.2d 1469 (9th Cir. 1989) 4

High v. Zant,
916 F.2d 1507 (11th Cir. 1990) 21

Kerr v. United States District Court,
426 U.S. 394 (1976) 15

Long v. Bureau on Economic Analysis,
646 F.2d 1310 (9th Cir. 1981),
vacated on other grounds,
454 U.S. 934 (1981) 11, 18

May v. Collins,
961 F.2d 74 (5th Cir. 1992) 21

CASES **Page(s)**

McCleskey v. Zant,
499 U.S. __, 111 S.Ct. 1454,
113 L.Ed.2d 517 (1991) 8, 11, 19

Neuschafer v. Whitley,
860 F.2d 1470
(9th Cir. 1988) 4, 5, 6, 12

Pitchess v. Davis,
421 U.S. 482 (1975) 21

Richmond v. Ricketts,
774 F.2d 957 (9th Cir. 1985) 5

Robison v. Maynard,
958 F.2d 1013 (10th Cir. 1992) 21

Roche v. Evaporated Milk Assn.,
319 U.S. 21 (1943) 15

Sanders v. United States,
373 U.S. 1 5

Silagy v. Peters,
905 F.2d 986 (7th Cir. 1990) 22

Smith v. Lujan,
588 F.2d 1304 (9th Cir. 1979) 11, 18

Teague v. Lane,
489 U.S. 288 (1989) 23

RULES

Rules Governing § 2254 Proceedings

Rule 9(b) 7, 20

Rule 11 20

Federal Rules of Civil Procedure

Rule 60(b) 2, et passim

Rule 60(b)(1) 12

United State Supreme Court Rules

Rule 20.1 16

No. 92 - 265

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

DANIEL VASQUEZ, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES) AND FOR WRIT OF PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (RUDI M. BREWSTER, DISTRICT COURT JUDGE)

Petitioners seek a writ of mandamus to compel the United States Court of Appeals for the Ninth Circuit to vacate its limited remand to the United States District Court for the Southern District of California (hereinafter "district court"), and a writ of prohibition to

prevent the district court from conducting a hearing or ruling upon a motion for relief from judgment pursuant to Rule 60(b) of the Rules of Civil Procedure. Petitioners' application to stay the district court proceedings scheduled for August 25, 1992, to permit this Court to rule upon their petition prior to the hearing was denied. The district court heard the matter as scheduled, and denied the Rule 60(b) motion. A written order denying the Rule 60(b) motion has not yet been entered.

Because the proceedings which petitioners sought to prevent have occurred, and because the district court ruled in petitioners' favor, the petition before this Court should be denied as moot. There is no longer any need for this Court to issue a writ prohibiting the district court from proceeding on the matter since the district court has

already ruled. Nor is there any basis for this Court to issue a writ of mandamus to compel the Ninth Circuit to vacate its limited remand since the case will be returned to the Ninth Circuit, where any issue as to the appropriateness of the Rule 60(b) proceedings may be considered in the appeal. If the Ninth Circuit concludes that the district court erred in denying the 60(b) motion, petitioners will have the opportunity to ask this court to issue a writ of certiorari.

I. STATEMENT OF THE CASE

Petitioners' statement of the case contains several misstatements and distortions of the record requiring respondent Hamilton to more accurately set forth a statement of the case.

On April 23, 1989, the Ninth Circuit reversed and remanded the denial of Hamilton's second pro se petition, with instructions for the district court to

undertake an independent review of the state court record and consider holding an evidentiary hearing in order to determine whether Hamilton's shackling denied him a fair trial. See Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989).

On March 6, 1990, the district court ordered Hamilton's counsel to identify all claims to be raised on habeas corpus in a procedure derived from Judge Alarcon's concurring opinion in Neuschafer v. Whitley, 860 F.2d 1470, 1482 (9th Cir. 1988). The district court ordered Hamilton's counsel to identify all additional claims that may be raised on habeas corpus, and cautioned that the deliberate failure to inform the court of any known claims might result in the application of abuse of the writ to bar Hamilton from ever raising such claims. At that time, abuse of the writ law in the Ninth Circuit provided that "previously

unadjudicated claims" raised in a subsequent petition would not be barred and "must be decided on the merits unless the petitioner has made a conscious decision deliberately to withhold them, is pursuing 'needless piecemeal litigation,' or has raised the claims only 'to vex, harass or delay.'" Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985), quoting Sanders v. United States, 373 U.S. 1, 18; Neuschafer v. Whitley, 860 F.2d 1470, 1477 (9th Cir. 1988).

On June 8, 1990, Hamilton identified 38 issues in compliance with the district court's March 6 Order, many of which were characterized as potential claims that were unexhausted and required further investigation and analysis. Hamilton was then ordered to pursue all unexhausted claims of which he was aware in state court, and was ultimately given until October 22, 1990, to do so. See

Order, September 18, 1990 (Appendix D). The September 18, 1990 Order stated that Hamilton will be deemed to have "voluntarily, knowingly, and intentionally waived and abandoned" all unexhausted claims not filed in state court and exhausted claims not filed in federal court by October 22, 1990. Id.

Petitioners incorrectly state that Hamilton expressly waived known claims in a federal court filing dated August 13, 1990. (Appendix C). The district court explicitly discounted petitioner's attempted waiver of potential claims. Id. (Appendix D, at A-177).

Hamilton, through his counsel, filed an amended and consolidated habeas petition in the district court on October 22, 1990, which did not include the potential claims identified in the June 8, 1990 filing or any other unexhausted claims. This was the first

counsel-assisted petition filed by Hamilton. Although petitioners describe several habeas corpus petitions filed in state and federal court by Hamilton, the amended and consolidated habeas corpus petition was considered by the district court to be a "first" petition for purposes of Rule 9(b) of the Rules Governing Section 2254 Proceedings. Appendix F, at A-192. Similarly, the habeas corpus petition filed in the California Supreme Court on December 30, 1991, discussed below, was the first and only counsel-assisted habeas corpus petition filed in state court. Neither the state or federal courts have found Hamilton's pro se petitions to contribute to any contention of abusive or successive petitions.

An evidentiary hearing, which encompassed only claims raised in the amended and consolidated petition, was

held from April 23, 1991 to May 9, 1991. Prior to the close of the evidentiary hearing, Hamilton's counsel moved to have the hearing held open to enable him to permit investigation and presentation of all potential claims in view of the then-just decided case of McCleskey v. Zant, 499 U.S. __, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), which appeared to require the presentation of all potentially meritorious claims in the first petition. The court denied this request. (Appendix E).

On July 1, 1991, Hamilton renewed his request, and moved to stay federal proceedings for 120 days to allow his counsel to conduct discovery and investigation of potentially meritorious claims, and to amend the habeas corpus petition to include such claims for which he might discover a sufficient basis. In support of the request to stay

proceedings, counsel provided a list of potentially meritorious claims which counsel declared may be reasonably supportable after further investigation. The court denied Hamilton's application to stay the proceedings on August 20, 1991, finding claims of which Hamilton was aware that had not been raised in the October 22, 1990 amended petition were waived and abandoned, and finding no basis to stay proceedings to allow Hamilton to investigate claims for which there was no supporting evidence. (Appendix F). On August 23, 1991, this court denied the amended and consolidated petition, and reiterated the finding of waiver and abandonment of claims. (Appendix A). On November 1, 1991, Hamilton's motion to alter or amend the judgment was denied.

On November 13, 1991, a certificate of probable cause was granted and a stay of execution issued pending

disposition of Hamilton's appeal of the denial of the petition for writ of habeas corpus before the Ninth Circuit Court of Appeals. Hamilton v. Vasquez, C.A. Nos. 91-56251; 91-56262; 91-56295; 91-56403; 91-80385.

Hamilton filed a habeas corpus petition in the California Supreme Court on December 30, 1991. This was the first counsel-assisted habeas corpus petition filed on petitioner's behalf in state court. The petition was denied on February 19, 1992, after informal briefing and without a hearing.

On March 17, 1992, Hamilton filed with the district court a request for a statement indicating its willingness to entertain a motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, together with the Rule 60(b) motion, which sought relief from judgment and permission to amend the petition with

the recently exhausted claims. In the Ninth Circuit, in order for the district court to consider a 60(b) motion while the case is pending on appeal, "the proper procedure is to ask the district court to indicate whether it wishes to entertain the motion, or to grant it, and then move [the Court of Appeal], if appropriate, for remand of the case." Long v. Bureau on Economic Analysis, 646 F.2d 1310, 1318 (9th Cir. 1981), vacated on other grounds, 454 U.S. 934 (1981), citing Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979). The Rule 60(b) motion was based in part on Hamilton's contention that his lawyers' failure to raise claims in the amended and consolidated petition for which they did not believe there was a sufficient factual basis, and their reliance on pre-McCleskey Ninth Circuit habeas corpus practice which did not bar raising such claims in a subsequent

petition, see e.g., Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988), constituted excusable neglect under Fed. R. Civ. P. 60(b)(1).

On June 1, 1992, after ordering and receiving briefing on the issue, the district court entered an order which stated its willingness to entertain the Rule 60(b) motion. (Appendix H). On June 11, 1992, Hamilton filed a motion in the Ninth Circuit for an order remanding the case to the district court for consideration of the Rule 60(b) motion. On July 7, 1992, the Ninth Circuit issued a limited remand to the district court to enable that court to consider the Rule 60(b) motion, while at the same time ordering the parties to adhere to the briefing schedule it set for the appeal. (Appendix B). On July 17, 1992, petitioners filed a motion to recall the mandate in the Ninth Circuit and a

petition for reconsideration of the remand order. The Ninth Circuit denied the motion and petition on July 31, 1992. (Appendix J).

On July 27, 1992, the district court calendared the hearing on the 60(b) motion for August 26, 1992 and then subsequently rescheduled the hearing for August 25, 1992. Petitioners filed their petition for mandamus and prohibition with this Court on August 10, 1992. This Court denied petitioners' applications for a stay of the proceedings, and the hearing on the Rule 60(b) motion went forward as scheduled on August 25, 1992. The district court orally denied the Rule 60(b) motion. A written order has not yet been entered.

The appellate briefing is now being completed, and the parties are awaiting the scheduling of oral argument.

II. SUMMARY OF ARGUMENT

Respondent Hamilton contends that the granting of extraordinary relief is unnecessary because the proceedings which petitioners sought to prevent have occurred, the district court ruled in petitioners' favor, and any issue regarding the appropriateness of the proceedings can be raised in due course within the appeal currently pending before the Ninth Circuit.

Hamilton further contends that the limited remand by the Ninth Circuit, after the district court indicated a willingness to entertain the Rule 60(b) motion, was proper. The Circuit did not stay the briefing schedule on the pending appeal, but simply permitted the district court to consider whether relief under Rule 60(b) was appropriate.

Finally, Hamilton contends that Rule 60(b) is appropriate in habeas corpus

proceedings to avoid piecemeal litigation without unduly expanding the scope of the proceedings, and the application of a cause and prejudice requirement to Rule 60(b) would be a new rule that could not be retroactively applied to this case.

III. ARGUMENT

A. THERE IS NO NEED FOR RELIEF BY WAY OF EXTRAORDINARY WRIT

The writ of mandamus is a drastic remedy, "to be invoked only in extraordinary situations." Kerr v. United States District Court, 426 U.S. 394, 402 (1976); see also Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980). Mandamus is appropriate only where:

> the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires, Roche v. Evaporated Milk Assn. [319 U.S. 21, 26 (1943)], and [satisfies] "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'

Kerr v. United States District Court, 426

U.S. at 403, quoting Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953); see also Sup. Ct. R. 20.1.

Petitioners are unable to demonstrate that they have no other adequate remedy to redress what it contends was an improper remand from the Ninth Circuit. After this Court denied petitioners' application for a stay of proceedings in the district court, a hearing on Hamilton's Rule 60(b) motion was held, and the motion was denied in its entirety. Thus, the district court proceedings which petitioners seek to prevent have essentially concluded, and petitioners are no longer in need of such relief. Moreover, petitioners prevailed below in their contention that Hamilton's Rule 60(b) motion should be denied. Any issue regarding the appropriateness of the Rule 60(b) proceedings may be considered in the appeal currently before the Ninth

Circuit or in a concurrent appeal, and then if necessary, on certiorari before this Court. There is no need for this Court to intervene at this stage of the proceedings.

Petitioners' request for extraordinary relief to prevent the district court from ruling and to avoid any unnecessary delay it claimed might occur because of the limited remand for consideration of the Rule 60(b) motion is therefore moot, and the petition should be denied.

B. NINTH CIRCUIT REMAND TO ALLOW DISTRICT COURT TO CONSIDER RULE 60(b) MOTION AFTER IT STATED ITS WILLINGNESS TO DO SO WAS APPROPRIATE

On August 23, 1991, the district court denied Hamilton's habeas corpus petition and deemed additional claims that were not raised in the petition to be waived and abandoned. While the denial of petition was pending appeal in the Ninth Circuit, Hamilton exhausted claims in

state court, and then sought relief from judgment pursuant to Rule 60(b) to allow for the amendment of the previously denied petition with the newly exhausted claims.

Because the district court no longer had jurisdiction to consider the motion, Carriger v. Lewis, __ F.2d __, 92 DAR 10417 (9th Cir. 7/28/92); Long v. Bureau on Economic Analysis, 646 F.2d 1310, 1318 (9th Cir. 1981), vacated on other grounds, 454 U.S. 934 (1981), Hamilton was required, pursuant to Ninth Circuit practice, to ask the district court to indicate whether it wished to entertain the motion, and if it so indicated, to then move the Court of Appeals for a remand. Long, 646 F.2d at 1318, citing Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979). After requesting and receiving full briefing on the issue, the same district court which previously deemed waived the claims

Hamilton sought to amend by way of Rule 60(b), issued a statement of its willingness to consider the motion. Thereafter, upon Hamilton's motion, the Ninth Circuit issued a limited remand to enable the district court to do so.

The remand was limited and has not caused any delay. The Ninth Circuit did not stay its briefing schedule on the appeal. This limited remand merely gave the district court jurisdiction to determine whether Rule 60(b) was appropriate under the circumstances of this case. Accordingly, the district court ruled that while Rule 60(b) was appropriate in habeas corpus proceedings, it was severely curtailed by McCleskey v. Zant, and found that Hamilton failed to meet either the standards of McCleskey or Rule 60(b) to warrant relief. Upon the timely filing of a notice of appeal by Hamilton, the entire case will return to

the Ninth Circuit for its consideration. There is nothing for this Court to redress with an extraordinary writ.

C. RULE 60(B) IS APPROPRIATE IN HABEAS PROCEEDINGS

Petitioners contend that Rule 60(b) is not applicable in habeas corpus proceedings because it would be inconsistent with the procedural requirements of habeas corpus practice, specifically the authority governing abuse of the writ. See Rules 9(b) & 11 of the Rules Governing Section 2254 Proceedings. The granting of the Rule 60(b) motion in this case, however, would not have conflicted with these principles. It is precisely the avoidance of piecemeal litigation which Hamilton sought to accomplish by seeking to litigate all claims in one action. Amending the previously denied petition with newly exhausted claims would have furthered the

interests of judicial economy and allowed petitioner to proceed with all of his claims in one proceeding.

Rule 60(b) has traditionally been utilized in habeas corpus proceedings. See Gray v. Estelle, 574 F.2d 209 (5th Cir. 1978), citing Pitchess v. Davis, 421 U.S. 482 (1975). The filing of a Rule 60(b) motion by a habeas petitioner challenging a death judgment is not uncommon, although the granting of such relief is. See Carriger v. Lewis, __ F.2d __, 92 DAR 10417 (9th Cir. 7/28/92) (district court lacked jurisdiction to consider Rule 60(b) motion); May v. Collins, 961 F.2d 74 (5th Cir. 1992) (evidence did not warrant relief under 60(b)); Robison v. Maynard, 958 F.2d 1013 (10th Cir. 1992)(60(b) motion untimely because brought more than one year after entry of judgment); High v. Zant, 916 F.2d 1507 (11th Cir. 1990)(district court did

not abuse discretion in denying 60(b) motion on merits); Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990) (claim raised in 60(b) motion dismissed on merits). The use of Rule 60(b) in such cases has not resulted in the wholesale expansion of federal habeas proceedings which petitioners allegedly fear. On the contrary, the one year timeliness requirement, the standards for granting the motion, and the jurisdictional hurdles to overcome once the habeas corpus petition has been denied, have provided sufficient safeguards to ensure "prompt resolution of the matter consistent with . . . fair consideration to all the issues presented in the case." In re Blodgett, 502 U.S. __, 116 L.Ed.2d 669, 112 S.Ct. 674 (1992).

Petitioners essentially seek to engraft a cause and prejudice analysis to Rule 60(b). This would constitute a

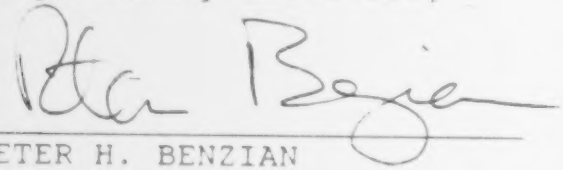
rewriting of the Federal Rules of Civil Procedure. The grounds for granting relief pursuant to Rule 60(b) include "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . . misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). A requirement of cause and prejudice would impose new and different standards on habeas petitioners seeking relief from judgment under Rule 60(b). Such a new rule would not be dictated by prior precedent. As such, it could not be retroactively applied to this case. Teague v. Lane, 489 U.S. 288 (1989). Moreover, such a radical departure from federal procedure should not be imposed through the issuance of the drastic remedy of an extraordinary writ.

IV. CONCLUSION

Based on the foregoing, respondent Hamilton requests that this Court deny the writ of mandamus and writ of prohibition.

DATED this 9th day of September, 1992.

Respectfully submitted,



PETER H. BENZIAN

Attorney for Respondent

RICHARD CAMINO

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

PETER H. BENZIAN
Latham & Watkins
701 "B" Street, Suite 2100
San Diego, California 92101-8197
(619) 236-1234

RICHARD CAMINO
17541 East 17th Street,
Second Floor
Tustin, California 92680
(714) 832-6620

October Term 1992
Case No. 92-265

DANIEL VASQUEZ, Warden
DANIEL E. LUNGREN,
Attorney General of the
State of California,

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 701 "B" Street, Suite 2100, San Diego, California 92101-8197.

I have served the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

DANIEL E. LUNGREN
Attorney General of
the State of California
PAT ZAHAROPOULOS
Supervising Deputy Attorney General
110 West "A" Street, Suite 700
San Diego, California 92101
(619) 237-7857

Attorneys for Petitioners

Hon. Rudi M. Brewster, Judge
United States District Court
940 Front Street
San Diego, CA 92189

Wendy Peoples
Staff Attorney
California Appellate Project
One Ecker Place, 4th Floor
San Francisco, CA 94105

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 9th day of September, 1992.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 9, 1992.

Donna J. Whitney
DONNA J. WHITNEY

Subscribed and sworn to before me
this 9th day of September, 1992.

Catherine L. Kilcrease
Notary Public in and for said County and State

OFFICIAL SEAL
CATHERINE L KILCREASE
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
MY COMM. EXP. APR. 16,1993

SD23\WP51\PHB2\HAMILTON\USSUPREM.POS